

## APPENDIX A

The pertinent provision of Title 28 United States Code is as follows:

28 U.S.C. §2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure concerning summary judgment are as follows:

“(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but, his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

“(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the

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motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The pertinent provisions of Rule 21 and 22 of this Court are as follows:

### Rule 21

#### REVIEW ON CERTIORARI—HOW SOUGHT— PARTIES

1. Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition, which shall conform in all respects to Rule 23, and a transcript of the record in the case, including the proceedings in the court whose judgment or decree is sought to be reviewed, which shall be certified by the clerk of the appropriate court or courts below. The entire record in the court to which certiorari is addressed shall be filed unless the parties agree that specified parts may be omitted as unnecessary for the determination of the petition or of the writ, if it be granted.

...

### Rule 22

#### REVIEW ON CERTIORARI—TIME FOR PETITIONING

3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law. . . .

**APPENDIX B**

The proceedings below involved extensive pretrial discovery by all parties including production of thousands of documents, deposition testimony, and exhibits covering hundreds of pages and extensive interrogatory answers (Pet. 29-30, f.n. 49). In support of their summary judgment motion, defendants submitted to the district court the following "Appendix" which was a chronological narrative abstract of this record material. Not one statement in this Appendix was ever disputed by plaintiffs (DCO F-9).

The Appendix is reproduced here in the form submitted to the court of appeals and the page numbers appearing thereon are the page numbers in the "Appellees' Appendix" filed therein. It is in the same form as submitted to the district court except that specific page references to the Record were affixed and interlineated after the notice of appeal had been filed.



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1203

IN THE

# United States District Court

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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**PERMA LIFE MUFFLERS, INC., et al.,**  
*Plaintiffs,*

vs.

**INTERNATIONAL PARTS CORPORATION, et al.,**

*Defendants.*

Civil Action  
No. 60 C 1636

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## APPENDIX

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This Appendix contains a separate chronological summarization with respect to each plaintiff. The record references throughout relate to a specific page, *e.g.*, (100), of the plaintiff's deposition testimony, except where such reference specifically identifies another record source, such as (Dep. G. Sherman p. 100) or (Plaintiff's Interrogatory Answer IV). After the initial depositions a further production of documents by plaintiffs was necessary, and when this was completed each plaintiff appeared for a supplemental deposition, which testimony is identified by the letter "S," as (S. 100). Documents produced by plaintiffs or defendants and marked at depositions are identified as (DX 100) or (PX 100). All deposition transcripts and exhibits have been filed with the Court.

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Throughout the Brief in Support of Defendants' Motion for Summary Judgment the factual statements therein are referenced to the exact page of this Appendix, as (App. 1).

# I.

## GREGORY T. SKARUPA

Gregory Skarupa is the alter ego of four plaintiff corporations<sup>1</sup> owned by him and his wife (4-8). These corporations, from March 1956 to February 1960, operated Midas Muffler Shops in the Washington, D.C., area.

### Pre-Midas

Skarupa became a resident of Washington, D.C., in 1939 when he was employed as a clerk and messenger by a government agency (10-11). In 1955, while employed by the Veterans Administration, he visited his brother-in-law's muffler shop in Cincinnati, Ohio, and since it appeared profitable Skarupa decided to open a similar shop (14-15, 17). Skarupa had no prior business experience with automotive exhaust systems or allied automobile products, but his military service had given him a familiarity with automobile parts (13).

His brother-in-law was then purchasing and installing International Parts exhaust systems, and he arranged a telephone introduction between Skarupa and Gordon Sherman (15-16). About September 1955, an International Parts salesman contacted Skarupa and discussed Skarupa's desire to duplicate the Cincinnati operation in the Washington, D.C., area, whereupon the International Parts

<sup>1</sup> Those corporations identified in paras. 16(A) through 16(D) of the Amended Complaint, as Perma Life Mufflers, Inc., Perma Life Mufflers of Arlington, Inc., Perma Life Mufflers of Prince Georges County, Inc., and Perma Life Muffler Shops of Alexandria, Va., Inc. (R. 15)

**1205** salesman agreed to help Skarupa start in business (16, 18, 20). Without contacting any other manufacturer, Skarupa began to look for a shop, and within about five days he had decided upon a location in Wheaton, Maryland (20, 22-23). By October 15, 1955, he had contacted an attorney, formed Perma Life Mufflers, Inc. and had the official opening of his Perma Life Muffler Shop (8, 23-24). His investment in this instance was \$5,200 (128, S. 27). His full-time employment with the Veterans Administration continued (12).

#### **First Midas Franchise**

From October 1955 to March 1956 Skarupa purchased and installed International exhaust systems (29), even though he understood that he could have handled any brand he desired (293). Although it was not until March 1956 that Skarupa first discussed with defendants the new Midas program which was then being introduced (16, 27, 29), he had previously discussed the proposed national chain of Midas shops with his brother-in-law (16-17). Gordon Sherman subsequently visited Skarupa's shop and discussed the Midas franchise requirements (29-30), the proposed national advertising (32), and the national guarantee which would be honored by each member of the chain (32-33). Skarupa's only concern was to obtain a franchise for the entire Washington metropolitan area in order that he "could reap the benefits of such development" (30, 35). Although he noticed other requirements in the franchise agreement, in his "heat of going into a new program" the only portion that concerned him was the geographical area of his franchise (35).

After this conference a franchise agreement was prepared and signed on April 10, 1956 (DX 13, 31-32). Skarupa examined this franchise "in detail," including the

**1206** provisions on purchases, 2% advertising surcharge, prices and payment terms (46-47). He understood that the franchise related to the Midas trademark (47) and that an International Parts purchaser, which he then was, was not governed by the Midas franchise or merchandising methods (292). Although the Midas terms of payment were 10 days, Skarupa initially received an extended period of payment by use of 30, 60 and 90 day notes to help him get started (173-74).

### **Expansion in Midas**

Skarupa's shop in Wheaton was profitable throughout 1956 (135) and within a short time after its change from a Perma Life Muffler Shop to a Midas Muffler Shop Skarupa was looking to expand to a second location. On December 1, 1956, he signed a second Midas franchise agreement covering a shop at Arlington, Virginia (DX 16). About \$1,000 of Skarupa's personal funds were invested in this second shop (130).<sup>2</sup> His full-time employment at the Veterans Administration continued (12).

Almost immediately after this second Midas shop opened, Skarupa began thinking about a third shop, in Prince Georges County, Maryland (135); and on May 6, 1957, a franchise agreement was signed for a Midas Shop located in Cottage City, Maryland (DX 17). The capital investment in this instance was about \$2,500 (136).

All three Midas Shops were then profitable (137), even though Skarupa was still a full-time employee of the Veterans Administration (12). His personal commitment to these business ventures amounted to a visit to a different shop every evening after his departure from his "regular employment," a visit and inspection of each shop on Satur-

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<sup>2</sup> Skarupa's financial success by 1958 allowed him to purchase for \$55,000 the building in which this Arlington shop was located (129).

1207 day, plus the necessary bookkeeping work which he did in the evenings (144-45). Skarupa's personal investment in his three Midas Shops was \$8,800; although he was only a part-time Midas dealer, by 1957 he had received over \$35,000 in wages as a corporate officer and in pre-tax corporate profits (DX 117-18).

In the fall of 1957 Skarupa began to look for further expansion into Alexandria, Virginia, and he was then advised that he would have to honor the Midas franchise provision that the owner devote full time to operation of the shop (137-38). In March 1958, Skarupa left the Veterans Administration, and with defendants' assistance he located a site in Alexandria and opened his fourth Midas Shop on July 30, 1958 (DX 18, 137-38). His capital investment in this shop was about \$1,000 (139).

#### **Advertising and National Participation in Midas**

All of Skarupa's Midas Shops had the "Midas Muffler Shop" sign outside the buildings and Midas point of sale material within the buildings (132-33). Skarupa "advertised extensively in order to get the business started" (126) and his local advertising continued throughout his relationship with defendants. The printed advertisements and radio or television script that he used prominently emphasized "Midas," "Midas Muffler" and "Midas Muffler Shops," "Unconditional Factory Guarantee," "Specialists" and "15 Minute Service."<sup>3</sup>

The marketing area for Skarupa's four shops was confined to the cities and counties in which they were located<sup>4</sup>

<sup>3</sup> Skarupa's Answer to Interrogatory IV has 26 sample advertisements attached to it. (R. 461-65; R. 471-91)

<sup>4</sup> Skarupa's Answer to Interrogatory V. (R. 493)

**1208** (187-88), and he was not in competition with any of the other plaintiff dealers (302-03). Even so, Skarupa's personal involvement with the Midas merchandising methods extended beyond the Washington, D.C., area. He became a member of the original National Advisory Council and served with that group until March 1958 (166). At one of the conventions of Midas dealers Skarupa gave a formal presentation (165). He was also a contributor to *The Dealer Dabbler* in which he took exception to a prior article by plaintiff Maxwell Ross (PX 36).

### **Desire to Expand**

After the Midas Shop in Alexandria opened, Skarupa sought "to open up additional shops" (56) since he thought that three additional shops could be established in the Washington area (316). However, in late 1958, he was allegedly told that he could not expand further (162) and that other Midas dealers were to be established in the Washington area (57). At a meeting with Gordon Sherman in early 1959 Skarupa discussed his desire to expand his Midas operation further (59). According to Skarupa, he was offered one more Midas franchise but was informed that additional franchises in that area would go to other dealers (59).<sup>5</sup> Such an arrangement was unacceptable to Skarupa since it did not protect him from possible competition (59). After this conference Skarupa did not again discuss with defendants the question of his opening more Midas Shops (S. 42).

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<sup>5</sup> One of defendants' purported objections to Skarupa's further expansion was that he "was making too much money" and would need investment advice (60). DX 119 shows that for 1958 Skarupa's personal corporate salary for nine months' full-time effort was \$44,000 and his corporate profit was an additional \$23,109, for a total of \$67,109.

**1209** During this same late 1958 and early 1959 period Skarupa encountered other actions by defendants which he considered unacceptable. The credit allowed to the dealer upon return of a muffler had been reduced in January 1959, and the new Midas muffler, according to Skarupa, was no better than the original muffler and in some instances inferior (167-68). In April 1959, Skarupa began to install shock absorbers which he purchased from a former sales representative for International Parts (202).

**Solicitation by Competitors and Abandonment of Midas**

A Robin Hood representative for Maremont Corp., Bert Herskee, contacted Skarupa in the spring of 1959 (195).<sup>6</sup> He had known Herskee when Herskee was previously employed by International Parts (195). Herskee advised him that Maremont was going to start a chain of Robin Hood muffler shops and explained the purported advantages to a Midas dealer who would switch to that franchise, emphasizing the paramount attraction to Skarupa—an exclusive franchise for the entire Washington metropolitan area (196-97).

Periodically thereafter Skarupa was visited by Herskee and urged to sign a Robin Hood franchise agreement (197).<sup>7</sup> In late November 1959, Skarupa decided to abandon Midas and change over to Robin Hood (189-90, 194-95, 197). On December 11, 1959, Skarupa exercised his right to terminate

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<sup>6</sup> Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (194-96).

<sup>7</sup> Solicitation of Skarupa by defendants' competitors was not limited to Maremont. In 1958 the president of the Texas Tail Pipe Co. telephoned Skarupa to solicit his business (273-74). Skarupa described such solicitation as a "regular stream of salesmen" (270).

**1210** the Midas franchise agreements (DX 25). His reasons for termination were defendants' refusal to allow further expansion, the proposed competition from new Midas dealers in the Washington area, and the restriction on purchases (190-91). Eight days later Skarupa signed the Robin Hood franchise agreement (DX 105), and the first delivery of Robin Hood mufflers was phased to arrive the day after the Midas termination was effective (204). All of the Midas trademarked parts were returned to defendants (204).<sup>8</sup>

### **Post-Midas Experience**

When Skarupa left the Midas program on February 11, 1960 (70), his four Robin Hood shops began to sell many of the allied automobile products described in the Amended Complaint (216, 219, 241). Since Robin Hood gave no guarantee to the consumer, Skarupa began to issue his personal guarantee (200). Within this first fiscal year, 1960, each of his four former Midas Shops operated at a loss<sup>9</sup> for a total of approximately \$13,700 (222, 243). His loss in the second year, 1961, was approximately \$30,000 (243).<sup>9</sup>

In early 1962 he decided to get rid of the business (254), and by February 12, 1962, he sold all four shops for about \$70,000 (10, 257). Two years as a Robin Hood dealer had necessitated that Skarupa return to his former employment at the Veterans Administration.

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<sup>8</sup> Skarupa characterized his problem as "related to a relatively unknown name to the public" [i.e., Robin Hood] and admitted that for motorists the name Midas provided "more reliance and dependence" (318).

<sup>9</sup> The corporate federal tax returns for 1961 show a total loss of \$31,076 (DX 64, 65, 66 and 67).

## 1211 Midas Profits

Skarupa's financial experience in the four Midas years, 1956 through 1959, was significantly different. His corporate profit and personal wages totaled \$182,763.31<sup>10</sup> from a personal investment of \$9,800<sup>11</sup> and only a part-time commitment of his own time for over half the period. When in 1958 he gave up his government position and became a full-time Midas dealer his corporate and wage income totaled \$67,109, consisting of personal wages of \$44,000 and corporate profit of \$23,109 (DX 119). For 1959 his income was \$80,607, consisting again of personal wages of \$44,000 and a corporate profit of \$36,607 (DX 120). Skarupa's personal wages for each of the years 1958 and 1959, \$44,000, exceeded his total personal income for all of the six years prior to Midas.<sup>12</sup> These profits were actually increased by about \$18,000 for 1958 and 1959 since the rent expense (DX 109 and DX 113) for Skarupa's Midas Shop in Arlington, Virginia, was in part a payment to Skarupa since he had purchased that building (129).

For these four years Skarupa voluntarily continued in the Midas program,<sup>13</sup> he received approximately \$200,000

<sup>10</sup> 1956 shown on DX 107 and DX-117; 1957 shown on DX 118; 1958 shown on DX 108 through DX 111 and DX 119; 1959 shown on DX 112 through DX 115 and DX 120.

<sup>11</sup> Skarupa's Answer to Interrogatory III,

<sup>12</sup> Skarupa's Answer to Interrogatory XV shows that his pre-Midas income for 1950 through 1955 was between \$5,000 and \$7,700 per year. (R. 881)

<sup>13</sup> Skarupa estimated that he serviced about 57,000 automobiles during his period with Midas (97).

1212 in profits. By this suit he seeks to recover an additional profit of \$843,132.<sup>14</sup>

### **Conspiracy Allegations**

No basis for the alleged conspiracy among the corporate divisions of International Parts and their officers and agents was testified to by Skarupa. He acknowledged that any documentary evidence relating thereto would have been within documents he produced (77-79), yet none of these documents support this assertion. The only conspiracy which he alleged was an understanding that he and all the Midas dealers were to follow the price lists (74-75).

## **II.**

### **MAXWELL E. ROSS**

Maxwell Ross and his relationship with defendants from late 1955 until late 1959 provided the factual setting for the allegations made by five plaintiffs,<sup>15</sup> through which Ross operated four Midas Shops located in Muskegon, Grand Rapids, Kalamazoo and Battle Creek, Michigan, and two in Minneapolis, Minnesota. Ross and his wife were the sole owners of these business enterprises and Ross was the chief executive (28-29).

<sup>14</sup> Skarupa's Answer to Interrogatory II. He seeks an additional amount in damages because of the restriction on his further involvement in the Midas Program by not being able to open three more Midas Shops (310-11, 316-17). (R. 449-57)

<sup>15</sup> Those plaintiffs are identified in paras. 16(E) through 16(I) of the Amended Complaint as: Robin Hood of Grand Rapids, Inc.; Robin Hood of Muskegon, Inc.; Regina M. Ross, assignee of Maxwell F. Ross, t/a Robin Hood Muffler Shop; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Clinic of Minneapolis; Regina M. Ross, assignee of Maxwell E. Ross, formerly t/a Midas Muffler Shop of Battle Creek. (R. 15-16)

## **1213 Pre-Midas**

Prior to 1951, Ross did accounting work and had business experience as the organizer of a concern which sold automobile car polish (4-7). Beginning in 1951 he was the sole proprietor of Heights Auto Parts Co., an auto parts and wrecking business located in Muskegon, Michigan (7-8), which concern sold new and used auto parts, including exhaust systems which it purchased from International Parts (10, 14, 21). In Ross' sales of exhaust systems at that time "brand names were not important" (24). In November 1955, Ross acquired a new location in Muskegon for his auto parts business (20).

### **First Midas Franchise**

In late 1955, Ross discussed with an International Parts salesman the Midas merchandising method which Ross described as the "new concept" of selling an exhaust system under a "free installation" approach to the consumer (224). The Midas concept—the guarantee, the national advertising, and the quick service of 15-minute installation—"excited" him (239-40). He recognized this as a good idea, "a magical term," and thought "it was a way of making some real money" (239).

Ross was then purchasing International brand exhaust system parts, and he was cognizant of the different methods whereby International Parts merchandised its International brand and its Midas brand, including the different terms of sale and an additional 2% surcharge for national advertising of the Midas brand (229-30).

After his exposure to this "new concept" (224), Ross investigated it further and inspected a Midas Shop in Milwaukee, Wisconsin, to find out "the things a person would normally want to know" before going into such a business

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(226). Ross thinks that he may have consulted an attorney at this time (361-62). Within a month, December 7, 1955, Ross read and signed his first Midas franchise agreement (237, DX 9 and DX 10), and on December 15 he started installation of the Midas exhaust systems (36).

### **Expansion in Midas**

Thereafter Ross sought to expand his Midas operation and to open additional shops in other cities in Michigan and Minnesota. His first expansion occurred within six months when he opened a Midas Shop in Grand Rapids, Michigan, and executed his second Midas franchise agreement in May 1956 (39-40, 120). Several months later, and still within a year of his first knowledge of Midas, Ross extended his operation to Minnesota with the opening in October 1956 of a Midas Shop in Minneapolis (42-43). At that time, Ross sought an exclusive franchise for all future Midas Shops in Minneapolis and St. Paul (44), even though he had never before engaged in business in that area (127). In May 1957, Ross expanded his Minneapolis operation with the opening of his fourth Midas Shop and his second in that city (47).

By April 1958, Ross had sold one of his Minneapolis shops (127-29), and his other Minneapolis shop was closed in August 1958 (185). Contemporaneous with closing his Minnesota operation, Ross in April 1958 purchased a Midas Shop in Kalamazoo, Michigan (168-69). He operated this Kalamazoo shop for about a year when he decided to seek a better location, and after consultation with the Midas architects (170-71) he constructed a new building in Kalamazoo "in keeping with the Midas concept" (62). Approximately three months after the new shop had been operating, he recognized that there was need for only one shop in Kalamazoo and closed the original shop (172-73).

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In May 1959, Ross again expanded his operation when he opened his fourth Midas Shop, in Battle Creek, Michigan (55).

Geographically, the market area for Ross' four Midas Shops encompassed the Michigan counties of Muskegon, Kent, Kalamazoo and Calhoun (278-79).<sup>16</sup> He described his sales impact in these areas as "tremendous" because of this "effective" and "novel" concept (281). His volume of business during 1959 increased to the point that he purchased a tractor and trailer to transport Midas merchandise from Chicago to his four shops throughout the Michigan area (231-32).

#### **Advertising and National Participation in Midas**

Ross recognized that advertising of the Midas exhaust system made a significant contribution to his market "impact," that Midas originated direct consumer advertising of mufflers, that by such advertising "the Midas story had become known" and created a public "demand," and that such advertising had given Ross the valuable image of "more substance" and "more credibility" (212, 313, 322, 427). Ross' shops displayed "the Midas sign identification" (268).

To supplement the Midas national advertising which reached his area (390-391), Ross employed local advertising<sup>17</sup> using material furnished by defendants (306).

<sup>16</sup> Interrogatory Answer V states "city or county in which each" shop was located. (R. 911)

<sup>17</sup> A detailed statement of Ross' advertising of the Midas trade name and service mark is contained in his answer to Interrogatory IV. (R. 907-10)

**1216** and it was successful (302) to the extent that he "was known as Mr. Midas" (S. 202).

Ross' involvement with Midas and its merchandising methods during the four-year period of his franchise agreements was not limited to his own shops. In early 1957, Ross became one of the original ten members of the dealers' National Advisory Council (284). According to Ross, the purpose of this Council was the formulation by dealers of "ideas and patterns of operation to produce the optimum profit for each Midas operator" (288). He characterized himself and the other dealers as initially being "guinea pigs" (303). His own contribution to the Council and to all Midas dealers was the help he gave to create the Midas field counselor (287), whose function was to visit the shops and help improve them (290). As late as May 1959, Ross had a letter published in *The Dealer Dabbler* wherein he circulated suggestions to all Midas dealers (PX 30).

#### **Desire to Expand**

Significant success came to Ross' new shop in Kalamazoo whereupon he decided to expand by opening a second Midas Shop in Grand Rapids (172-73). Ross, in early 1959, "liked the program," so much that he offered to construct two new buildings in Grand Rapids and then to vacate the older premises where he was then operating a "very prosperous shop" (172-74).

During this same period Ross became displeased with certain actions of defendants. He encountered hesitancy from defendants in concurring with his desire to add another outlet in Grand Rapids (172). Just prior to this time Ross had disagreed with defendants over the return

**1217** of merchandise involved in his purchase of the Midas Shop in Kalamazoo (170). He was unhappy with the change in the muffler replacement credit to the dealer which had become effective in early 1959 and which in Ross' judgment had become prohibitively expensive (179).

**Solicitation by Competitors and Abandonment of Midas**

In early 1959, Ross spoke with an unnamed Robin Hood<sup>18</sup> representative concerning the possibility that Ross terminate his relationship with Midas and that he affiliate with the Robin Hood franchise system of selling exhaust systems (161-62).<sup>19</sup> Subsequently Ross was visited by Bert Herskee, a former Midas field counselor who was then the sales manager for Robin Hood, and Ross was again solicited to abandon Midas and convert to Robin Hood (162-63). Among the enticements offered to Ross was the exclusive Robin Hood franchise for the entire State of Michigan, a second line muffler, and the availability of merchandise at a cheaper price (163).

When Herskee again solicited Ross in October 1959, Ross agreed to terminate his Midas franchises and to change over to the Robin Hood program (166-67). On November 13, 1959, he exercised his contract right and sent a letter to defendants terminating his Midas franchises (146-47, DX 6 and DX 7). He tried to sever all connections, including the return of merchandise, within thirty days (315).

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<sup>18</sup> Robin Hood is the brand name for exhaust systems sold by the Maremont Corp., a competitor of defendants (151).

<sup>19</sup> Ross characterized the Midas Shops as being known in the trade as "a successful organization individually and collectively." He was contacted and solicited all through this time by defendants' competitors (396-97).

**1218 Post-Midas Experience**

On December 13, 1959 (150), Ross began to sell exhaust systems as a Robin Hood dealer. He continued to operate his four shops in substantially the same manner, the only change being the introduction of shocks and springs (152). Although Ross obtained a franchise agreement from Maremont as the exclusive Robin Hood dealer for the State of Michigan, he did not open any additional shops (152). Under the Robin Hood program, no written guarantee to the consumer was issued by the manufacturer (S. 172), and so Ross issued his personal guarantee to the customer which he described as approximately the same as the Midas guarantee (164).

Without dispute, as a Robin Hood dealer Ross was financially unsuccessful (315). Robin Hood had no national significance and had never "spent the kind of money on national advertising that Midas did" (319-20). Ross spent a good deal of money advertising the Robin Hood program (337). Two former Midas Shops closed in the first year, Battle Creek in August 1960 and Kalamazoo in December 1960 (185-86). For his first fiscal year as a Robin Hood dealer, July 1960,<sup>20</sup> Ross had a corporate loss of \$20,165 (DX 184). Grand Rapids closed in October 1961 and Muskegon in December 1961 (325). In two years his former Midas Shops were out of business.

**Midas Profits**

Significant and undisputed financial success came to Ross during his four years as a Midas dealer.<sup>21</sup> In the fiscal

<sup>20</sup> Ross had a fiscal year for all his business ventures of August 1 through July 31.

<sup>21</sup> Ross' income tax records for the period prior to 1955 are not available (Ross' Interrogatory Answer XV). (R. 942)

**1219** year ending July 31, 1956, during which time he operated his wrecking business and opened his first two Midas Shops, he had a net profit of \$21,139 (DX 179). During the fiscal year ending July 1957 his profit had risen to \$75,961 on his Michigan shops, with an over-all profit of \$52,716, limited by the losses on the distant operations in Minnesota (DX 180). During the next fiscal year Ross incorporated his various shops and in July 1958 had a total profit of \$41,198, consisting of a pretax corporate profit of \$20,398 plus a personal income as a corporate officer of \$20,800 (DX 181). For the 1959 fiscal year Ross had a total profit of \$39,313, including a pretax corporate profit of \$18,513 and a personal income of \$20,800 (DX 183).

In four fiscal years, Ross made approximately \$154,000 as a Midas dealer. By this lawsuit he seeks an additional \$488,400<sup>22</sup> in alleged unobtained profits for this same period.

### **Conspiracy Allegations**

Ross' knowledge of the alleged conspiracy among defendants was based solely on the relationship between International Parts and Midas (98).<sup>23</sup> He admitted that he knew of no events relating to the alleged conspiracy (394-95) and that he had turned over to his counsel all documents relating thereto (97).

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<sup>22</sup> Paras. 41(E) through 41(1) of the Amended Complaint. (R. 157)

<sup>23</sup> Ross admitted that he did no business with the defendant Powell Corp. and that none of his competitors were customers of Powell (409). He never mentioned defendant Muffler Corp.

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## III.

## JOSEPH PIERCE

Pierce Muffler Shops, Inc. was the corporate structure through which Joseph Pierce, from April 1956 to September 1959, operated seven Midas Muffler Shops in the up-state New York cities of Binghamton, Syracuse, Utica, Rome, Elmira and Mattydale.<sup>24</sup>

**Pre-Midas**

Pierce was a lifetime resident of the Syracuse, New York, area and has been in business there for many years (2-5). Western Auto had a dealership program, and in 1937 Pierce opened one such store in Fulton, New York (4-5). He continued in this business until 1946, during which period he opened additional Western Auto stores in Oswego and Baldwinsville (5). J. C. Pierce, Inc., not the present corporate plaintiff, was formed in 1947, and thereafter Pierce added retail stores in Syracuse, Rome, Canastota, Cortland and North Syracuse (6-10). These stores handled many automotive and non-automotive products, including International brand exhaust systems, but Firestone tires were their major item (11-14). Pierce sold his retail stores in Canastota, Cortland and North Syracuse in 1951 and the store in Syracuse in 1952 (27-28). A fire destroyed the Baldwinsville store in 1960, so Pierce, through his separate non-party corporation, now operates retail stores only at Fulton and Rome (28).<sup>25</sup>

<sup>24</sup> It is identified in para. 16(M) as Pierce Muffler Shops, Inc., formerly Midas Muffler Sales & Service, Inc. (R. 16).

<sup>25</sup> Throughout the subsequent period of Pierce's operation of Midas Muffler Shops, he sold International brand exhaust parts from these retail stores (47).

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In 1954, J. C. Pierce, Inc. diversified and established a new division, Muffler Sales and Service (19). Pierce had prior experience installing mufflers and shocks at his retail stores and he then felt that "there was a future to the muffler installation business."<sup>26</sup> Exhaust systems which Pierce was then selling were purchased from International Parts, and he discussed with an International Parts representative "opening a specialized muffler installation shop, muffler, springs and shocks" (22). Assisted by the International Parts representative, Pierce found a suitable location in Binghamton for his first muffler shop (22).

Pierce expanded his muffler installation business in September 1955 by opening a second shop in Syracuse (29, 31) and a third shop in Utica; these three shops were then consolidated into a separate corporation, Muffler Sales and Service, Inc. (30-32). In April 1956 the corporate name was changed to Midas Muffler Sales and Service, Inc. (36-37) and subsequently changed to Pierce Muffler Shops, Inc. (19), the present plaintiff. This corporation is owned by the Pierce family (50).

#### **First Midas Franchise**

Midas was first discussed by Pierce and an International Parts representative in February or March 1956, at which time Pierce visited a Midas Muffler Shop in Buffalo (38, 46) and discussed the Midas program with the shop owner (43-44). Pierce was informed that Midas Shops were to be opened in upstate New York and that existing purchasers from International Parts were to be given the first opportunity to obtain the new franchises (39). "So as not to

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<sup>26</sup> Pierce's personal income for 1953 through 1955 was, respectively, \$20,028, \$17,977 and \$9,929 (Pierce's Interrogatory Answer XV) (R. 767)

**1222** invite competition," Pierce signed his first Midas franchise agreements on April 1, 1956, for the three existing Pierce Muffler Shops in Binghamton, Syracuse and Utica (39, 54-56, DX 46, 47 and 52).<sup>27</sup>

### **Expansion in Midas**

By June 1956, Pierce had opened his fourth Midas Shop, a second shop in Syracuse (36). His expansion continued, and by May 1957 he had obtained locations in Rome and Elmira and signed Midas franchise agreements for these two shops (36, DX 49 and DX 50). Sales by these shops had increased to such an extent by 1957 that Pierce opened a warehouse for his Midas operations in Syracuse (24-25). Without even asking defendants for another Midas franchise agreement, Pierce renewed his expansion in 1958 and opened his seventh Midas Shop, in Mattydale, a suburb of Syracuse (34, 36, 81).<sup>28</sup>

### **Advertising and National Participation in Midas**

Pierce's shops were identified by the "Midas Muffler Shop" signs (111). There were Midas display cards and advertising material at all locations (113-14). Like the other plaintiffs, Pierce used Midas advertising material in his local advertising. A typical TV script advised the

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<sup>27</sup> Pierce acknowledged that he read the franchise agreements before signing them (134).

<sup>28</sup> On one occasion Pierce had a prospective Midas dealer at one of his shops and explained the Midas program to him and "told him I was enthused about it" (132). Later, Pierce brought a personal friend to defendants' headquarters in Chicago to inquire about a Midas franchise (91-92).

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motorist to "depend on Midas for the world's finest mufflers, tailpipes and exhaust systems."<sup>29</sup>

His involvement with the Midas concept was, like Ross and Skarupa, nationwide in that Pierce was also a member of the National Advisory Council (96).<sup>30</sup>

#### **Pierce's Threats of Termination**

Pierce was unhappy with the reduction from 100% to 50% on the credit to the dealer on the guarantee, which became effective on January 1, 1959. After two months' experience under the revised credit program he wrote Gordon Sherman and formally complained about the additional expense (DX 53). After reciting his displeasure with the quality of the Midas muffler, Pierce alerted Sherman as to his future plans by threatening: "I am writing you in all fairness and stating my dissatisfaction with the present program. If I should decide to make a change in the future I would like this to go on record as to the reason why" (DX 53). Subsequently, he voiced the same opinion to Midas field counselors who called on him (184), and in one such conversation Pierce indicated that he was thinking of taking on a different brand of mufflers (S. 123).

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<sup>29</sup> Pierce's local advertising expenditures and samples of other TV and radio scripts and newspaper mats are attached to Interrogatory Answer IV. All emphasized the Midas guarantee, the coast-to-coast service from exhaust specialists, and the Midas image of "clean, quick and courteous service." (R. 628-92)

<sup>30</sup> The market for Pierce's Midas Shops was limited to the cities and counties in which they were located (Pierce's Interrogatory Answer V), and he was not in competition with other Midas dealers (334). (R. 643)

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At various times throughout this period Pierce's Midas Shops sold and installed certain "allied automobile products" (121-23, 126-29). Although his practice of installing non-exhaust system parts was discouraged by the Midas field counselors, Pierce acknowledged that he was never threatened with termination of his franchises (319). During a personal conversation with Gordon Sherman, Pierce was told: "Joe, I will never tell you not to sell shocks and springs" (163). Pierce crystallized the field counselor's comments on his sale of non-exhaust system parts: "if I wouldn't [discontinue], there was not much he could do about it; all he could do was make his report" (160).

Using his Midas Muffler Shops, as an outlet, Pierce began, in 1958 or 1959, to sell Nu-Era Mufflers from all his locations (152-53, 305, S. 134-35). Pierce acknowledged that he issued a guarantee on these mufflers that did not differ from the Midas guarantee and that he did not know whether the customer knew whether he received Pierce's guarantee or the Midas guarantee (153-54).

#### **Termination of Pierce**

About March 1959, Pierce was contacted by defendants' Chicago office after he placed a large order, and he was advised that the balance in his account was too high and that the shipment would be C.O.D. unless Pierce cleared up his account (240). In about June 1959, Pierce requested that his franchise on the Midas Shop in Elmira be terminated in order that he could operate independently and sell allied automobile products (198-99).

Midas executives, since the letter of February 25, 1959, had been concerned about Pierce's threat of cancellation and had also been aware of the large balance existing in Pierce's account (Dep. G. Sherman pp. 310-13). When the balance on Pierce's account had been reduced, defend-

**1225** ants exercised their right of termination by notice given on October 27, 1959, (Dep. G. Sherman p. 311, DX 55). Subsequently, Midas merchandise was returned to defendants by Pierce (225-26).

#### **Post-Midas Experience**

Following the termination of the Midas franchise agreements, Pierce was contacted by Herskee and offered the Robin Hood franchise program (352-53). Pierce was not interested in any franchise but agreed to purchase Arrow brand mufflers<sup>31</sup> from Herskee on the understanding that no Robin Hood competition would enter Pierce's market area (353-54). Pierce changed his operation by advertising shocks, springs, and second-line mufflers (243), and by subsequently closing three of his former Midas shops. He closed his Rome shop, in 1960; sold his North Syracuse shop in 1961, and closed his Binghamton shop in 1962 (246).

#### **Midas Profits**

A fiscal year ending on September 30 was employed by the Pierce corporation.<sup>32</sup> Six months operation as a Midas dealer was included in the fiscal year ending September 1956, for which year Pierce had a gross profit of \$31,311, consisting of pretax corporate profits of \$17,269 and Pierce's personal wages from these operations, which does not include his wages from the J. C. Pierce, Inc., of \$14,042 (DX 164). For the next fiscal year, ending September

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<sup>31</sup> Pierce did not believe there was any difference between the Robin Hood brand and Arrow brand mufflers (355).

<sup>32</sup> No separate financial statements on the individual Pierce shops are available (S. 113).

**1226** 1957, the comparable profit and wages were \$16,454 and \$12,000 for a total income of \$28,454 (DX 165). By September 1958, the pretax corporate profit had risen to \$26,778, and Pierce's personal wages had increased to \$33,985 (DX 166). To this 1958 profit an additional \$15,000 must be added as "a transfer of profit" to another of Pierce's corporations for a fiscal year total income of \$75,763.<sup>33</sup> Fiscal year ending September 1959, Pierce's last complete fiscal year as a Midas dealer, brought a total profit of \$45,619, consisting of a pretax corporate profit of \$27,919 and personal wage of \$17,700 (DX 170).

Profits of approximately \$180,000 resulted from Pierce's relationship with the Midas program, and by this action he seeks to recover an additional \$502,700, as requested in paragraph 41(M) of the Amended Complaint, or an additional \$1,305,826, as computed by his answer to Interrogatory II. (R. 158; R 617-26)

### **Conspiracy Allegations**

Pierce's knowledge of the alleged conspiracy was limited to the agreements between Midas, Inc. and the numerous Midas Muffler Shops and International Parts and the International dealers (284). All of the documents which he had relating to this claim were supplied to his attorneys (73-74).

## **IV.**

### **CLAUDE D. WHEELER**

Claude Wheeler, during the three-year period from September 1956 to November 1959 operated Midas Shops as a sole proprietor.<sup>34</sup> Two shops were located in St. Louis, Missouri and a third shop in East St. Louis, Illinois.

<sup>33</sup> Pierce Interrogatory Answer III. (R. 585)

<sup>34</sup> He is identified in para. 16(J) as Claude Wheeler, t/a Robin Hood Muffler Shops, formerly Midas Muffler Shops, an individual. (R. 16)

## **1227 Pre-Midas**

From 1943 to 1956, Wheeler resided in Gideon, Missouri, which is about 200 miles from St. Louis. At that time he was the proprietor of a pool room (3-6). His income from this venture during 1950 through 1955 averaged approximately \$5,900 per year.<sup>35</sup>

### **First Midas Franchise**

A Midas advertisement caught his attention in the summer of 1956; and Wheeler wrote defendants concerning the possibility of obtaining a Midas franchise (7-8). In August 1956 a representative of defendants visited Wheeler in Gideon, and Wheeler indicated an interest in a Midas Muffler Shop in St. Louis or Springfield, Missouri (8-10). The Midas merchandising methods were explained to Wheeler, including information as to the guarantee, an initial cost of \$5,000, physical and rent requirements for a shop, the national advertising program and the Midas dealer's 2% advertising surcharge (8-12). Wheeler was certain that the franchise agreement was discussed at this time (11, 16-17). At the conclusion of this meeting Wheeler was given some material explaining the Midas concept and was invited to visit defendants' offices in Chicago (8, 11).

About a week later Wheeler came to Chicago (12-14). He had no prior experience with exhaust systems and "wasn't too familiar with any type of a muffler" (7, 14), so he visited a Midas Shop in Hammond, Indiana, to observe, for the first time, the actual operation of a muffler installation shop (14-15). By the time Wheeler concluded

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<sup>35</sup> Wheeler's Answer to Interrogatory XV attached Wheeler's federal tax returns for 1950 through 1953 and they state such income, respectively, as \$3,330, \$5,636, \$5,615 and \$6,250. DX 148 and DX 149, tax returns for 1954 and 1955 show, respectively, income of \$8,189 and \$6,684. (R. 534-75)

**1228** his Chicago trip he had decided to, go into the Midas program; and an appointment was made to have defendants assist in looking for a location in St. Louis (17-19).

A location was promptly selected (20); and Wheeler's first Midas franchise agreement, which he read before signing, was dated September 6, 1956 (28-29, DX 39). Shortly after he executed the franchise agreement, Wheeler made a second visit to the Midas Shop in Hammond, Indiana, and spent several days closely observing the operation "to learn to run a muffler shop" (30). In less than two months since his first exposure to Midas or to a muffler, his Midas Muffler Shop in St. Louis opened for business on September 29, 1956 (29).

#### **Expansion in Midas**

Although this first shop incurred a loss for 1956, having been open for only three months, Wheeler in early 1957 was "getting to learn the business" and "wanted to expand" since he did not want another Midas dealer to come into the market (67-68). Assisted by a Midas field counselor, a second location was decided upon, and by March 1957 Wheeler opened a second Midas Shop in St. Louis (68, 77).

With the second shop open and the first shop showing "substantial volume," Wheeler saw prospect of a third shop to be located in East St. Louis (85). A location search was undertaken by Wheeler and a Midas field counselor, and by July 1957 a suitable building was found (86). The franchise agreement for this Midas Shop was signed on July 12, 1957 (DX 41 and DX 42), and the third shop was opened in September (107), still less than a year since Wheeler opened his first shop.

One of Wheeler's St. Louis shops did not progress as he anticipated, and in late 1958 or early 1959 he decided that it should be moved to a different location (119-20).

**1229** The Midas field counselor suggested that a new shop be built (120), but Wheeler found an existing building in a location agreeable to defendants (124). During this period Wheeler was advised that another Midas dealer was going to be brought into the St. Louis area (134). Even though Wheeler objected to the prospect of potential competition, he proceeded to open the new shop in June 1959 (128, 134).<sup>36</sup>

### **Advertising and National Participation in Midas**

Wheeler's shops were identified by the "Midas Muffler Shop" sign, and he also had Midas literature displayed inside (38, 94-95). Midas' national advertising through magazines, radio, and television entered Wheeler's area (222). He supplemented this with local advertising, which emphasized "Midas" and the nationwide chain of shops.<sup>37</sup>

Although his own market area was limited to St. Louis County and East St. Louis,<sup>38</sup> Wheeler became nationally involved in the Midas program, and near the end of 1957 he became a member of the National Advisory Council and served for a year (108). At a meeting of dealers, he spoke on the question of advertising (82).

### **Solicitation by Competitors and Abandonment of Midas**

During the summer of 1958, a Maremont representative first explained the Robin Hood program to Wheeler, at which time Wheeler's reaction was that he "didn't care to go into it right at that time," but that he "would keep in

<sup>36</sup> Wheeler said that he refused to sign a Midas franchise agreement for this new location because it gave him *too small a territory* and restricted purchases of related products (128).

<sup>37</sup> Wheeler's Answer to Interrogatory IV attaches example of the Midas scripts and mats which he used. (R. 803 - 24)

<sup>38</sup> Wheeler's Answer to Interrogatory V. (R. 825)

**1230** contact" (155). In late 1958 or early 1959 Wheeler was again contacted by the original Robin Hood solicitor, who was then accompanied by Herskee (156). At a third solicitation, before Wheeler opened his third Midas Shop, he discussed with Herskee the critical issue, namely, that he "wanted to see what Midas was going to do with this new franchise" and whether Midas was going to bring in a new dealer (157). The proposed franchise from Robin Hood was for an exclusive right to the entire St. Louis and East St. Louis area (213-14). Another Robin Hood solicitation occurred after Wheeler's new Midas Shop opened, at which time Wheeler accepted an invitation to visit the Maremont factory in Chicago since he was thinking of changing from Midas (158). Shortly thereafter, on September 4, 1959, Wheeler advised Midas that his franchise agreements were terminated effective November 9, 1959 (DX 45). On September 24, Wheeler's new Robin Hood franchise was executed (DX 147).

#### **Wheeler's Ultimatum Re His Midas Expansion**

Upon defendants' receipt of the termination notice, Wheeler was immediately contacted by Midas' field counselors, but they were unsuccessful in attempting to persuade him to stay in the Midas program (140-41). A few days later Gordon Sherman came to St. Louis to confer, at which time Wheeler said that he was leaving the program because Midas was "bringing someone else into my territory" (178-79).<sup>39</sup> Wheeler told Sherman he would "stay in the program" if he received a 100% guarantee on returns (179). He also insisted that he be given "an

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<sup>39</sup> Wheeler asserted that he first inquired as to an exclusive Midas franchise for St. Louis on his first trip to Chicago and was then advised that expansion depended "on how the shop operation went" (16).

**1231** exclusive franchise," and would even be willing to purchase the objectionable prospective Midas Shop in St. Louis from its owners (179).<sup>40</sup> Gordon Sherman would not agree to this ultimatum (179), and there was no further discussion between the parties (181). Wheeler sent "all of the Midas merchandise back to the factory for credit" (181).

### **Post-Midas Experience**

As a Robin Hood dealer, Wheeler added selected "allied automobile products" in all three shops (184-85, 210-11) and purchased exhaust system parts from several manufacturers (153-54). Similar to Ross and Skarupa, he issued a personal guarantee on the Robin Hood muffler (171-72). Although Wheeler's Robin Hood franchise encompassed the large geographic area he sought from defendants,<sup>41</sup> he closed one of his St. Louis shops in January 1961 (137-38), and he did not open any additional shops (214).

Like the other plaintiffs, Wheeler's post-Midas experience was remarkably unsuccessful when compared to his financial success with Midas. In 1960, Wheeler incorporated his two Robin Hood shops in St. Louis, and by the end of that year these corporations had a net operating loss of \$13,320 (DX 143), with the East St. Louis shop having a

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<sup>40</sup> Wheeler acknowledged that other Midas dealers did not then compete with him (S 238).

<sup>41</sup>As described in Wheeler's Robin Hood franchise agreement, the area included somewhat more than the eastern one-third of Missouri, with St. Louis on the east and Columbia and Jefferson City on the west, and the southwest portion of Illinois, from Alton to Cairo, including all of the area around East St. Louis, and with the addition of Quincy, on the Illinois-Missouri border (DX 147).

1232 net profit of \$6,051 (DX 145). In 1961, Wheeler again operated at a loss, the St. Louis corporate operations losing \$8,016 (DX 144), and the profit from the East St. Louis proprietorship being reduced to \$2,789 (DX 146). By the end of 1961, Wheeler had closed one of his shops (137), and he was in the same financial position as he had been in the early 1950s when he operated the pool hall.

### **Midas Profits**

Wheeler had operated under the Midas franchise and the Midas merchandise methods during part of 1956, all of 1957 and 1958, and substantially all of 1959. His personal investment in these three Midas Shops was estimated at \$30,000 (121, 263). In 1957, Wheeler's participation in the Midas program brought him a personal income of \$29,920 (DX 133, 134, 135 and 151); even though two of his shops had been opened during that year. For 1958 his income had risen to \$34,562 (DX 136, 137, 138 and 152), even though the East St. Louis shop had been closed by a labor strike for a month during that year (97). For 1959 there are no financial statements that reflect the Midas portion of the year, that is, through November 9 (S. 95); however, the entire year, including the expenses attributed to the change-over from Midas to Robin Hood, brought a profit of \$34,034 (DX 139, 140, 141, 142 and 153).

To the almost \$100,000 in personal profits during his three years with Midas, Wheeler now seeks to add \$439,544.06.<sup>42</sup>

<sup>42</sup> The damages claimed in Wheeler's Answer to Interrogatory II (R. 792-801)

**233 Conspiracy Allegations**

As with all of the plaintiffs, Wheeler produced every document he had relating to the alleged conspiracy (55). None of these documents support his claim.